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SUPREME COURT, U.S.

No. 061513

MAY 15 2007

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IN THE

Supreme Court of the United States

REGATTA BAY LIMITED, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court transferred the case below to the Court of Federal Claims because it involves a contract claim for more than $10,000.00. The Court of Federal Claims dismissed contract-related claims by summary judgment but held that it has no subject matter jurisdiction over tortious breach of contract claim, including breach of the covenant of good faith and fair dealing. The Federal Circuit Court of Appeals affirmed and denied a motion to transfer the case to district court. The questions presented are:

1. Whether the Court of Federal Claims has jurisdiction over tortious breach claims against the United States, including breach of the covenant of good faith and fair dealing as "a claim ... founded ... upon any express or implied contract" within the meaning of the Tucker Act, 28 U.S.C. § 1491(a).

2. If not, whether the Court of Federal Claims has a jurisdictional duty to consider a motion to transfer to the district court tortious breach claims. .

3. Whether summary judgment should be reversed as to the dismissal of contract-based claims, including breach of contract, declaratory judgment, breach of statutory duties to meet contractual prerequisites to foreclosure under the Multi-Family Mortgage Foreclosure Act and, alternatively, inverse condemnation where privity is denied, where an underlying claim for breach of the covenant of good faith and fair dealing is stated but was not considered.

RULE 29.6

No parent corporation or any publicly held company owns ten percent (10%) or more of the stock of Petitioner Regatta Bay Limited.

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JURISDICTION

The Judgment of the Court of Federal Claims was entered on January 6, 2006. (14a.) The Court of Appeals for the Federal Circuit entered judgment on December 8, 2006. (1a.) The Court of Appeals for the Federal Circuit denied a petition for rehearing on February 14, 2007. (12a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. § 1491(a)(1). (15a.) NRS 107.080(2) and (3).

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[1] "__a" refers to the attached Appendix. "JA__" refers to the Joint Appendix filed in the Federal Circuit Court of Appeals.

STATEMENT

The jurisdiction of the district court was invoked under 28 U.S.C. § 1346 because of a federal question under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq, following denial of an administrative claim. (JA 971.) The district court transferred the case under 28 U.S.C. § 1331 to the Court of Federal Claims under 28 U.S.C. § 1491(a) because the case involves "a claim on an express or implied contract with the United States for more than $10,000." (JA 454.)

Petitioner, Regatta Bay Limited ("Regatta"), assumed the obligations under a Note, Trust Deed and Regulatory Agreement for rental of subsidized, low-income housing at the Regatta Bay Apartments in Las Vegas, Nevada, in 1983. The Regulatory Agreement obligated HUD to endorse insurance for Regatta's mortgagee. (JA 867.) HUD approved the use of Regatta's limited partnership agreement, which authorizes payment by Regatta to its General Partner, Phil Rosequist, on working capital loans authorized to be advanced by him for Regatta's use at the prime rate of interest.

Regatta provided the Department of Housing and Urban Development ("HUD") with monthly operating reports, annual certified audits, which show the working capital loans and repayments. Regatta paid its lender, Reilly Mortgage Group, Inc. ("Reilly") any required fees whenever Regatta was late on a monthly payment, upon receipt of notice and demand from Reilly, some twenty-three (23) times documented in the record. (JA 29-51.) In one instance, Reilly accepted late fees which were two years in arrears, whereas the accepted monthly payments are not documented in the record to have ever been more than

two months in arrears. (JA 49, 51.) Regatta borrowed and paid on a series of working capital loans made by the General Partner to Regatta under Regatta's limited partnership agreement. Such payments totaled more than $1,000,000.00 by 1993. (JA 855-859, 959.)

HUD's Inspector General conducted an audit of Regatta's books and records in 1993. The record discloses no finding by the Inspector General against Regatta of any wrongdoing concerning the payments on the working capital loan. (JA 454.)

On March 24, 2000, HUD sent Regatta a letter demanding within thirty (30) days repayment of the working capital loan payments in excess of $1 million dollars without explaining any legal basis for the retroactive demand to 1985. (JA 976-978.) The letter states:

> The failure to comply with any or all of the actions required herein [the payment within 30 days of more than $1,000,000.] could result in the suspension or abatement of any federal assistance, or the imposition of administrative, civil sanction or other corrective action the DEC [Departmental Enforcement Center] deems appropriate under the circumstances.

(JA 978.) Each of HUD's presented options to Regatta was unreasonable.

More than a year went by before HUD gave any breakdown of the one million dollar demand. In a May 3, 2001, letter, HUD for the first time specified that the dates of payment by Regatta to its General Partner for more than one million dollars were prior to the Inspector General's audit. (JA 958-960.) The May 3, 2001 letter shows that in its March 24, 2000, demand

HUD had recharacterized the previously HUD-approved working capital loan repayments as unauthorized withdrawals from project funds. HUD's March 24, 2000 demand for more than one million dollars acted as an equity burden, like a lien, thereby eliminating Regatta's ability to secure any additional working capital loans. HUD also knew, but did not disclose that each of the payments HUD alleged to be improper was more than six (6) years old.

After making the March 24, 2000, demand, HUD proceeded aggressively to take the property from Regatta. Although Reilly followed the sixteen-year course of performance of sending a late notice for Regatta's May 2000 mortgage payment, HUD suddenly instructed Reilly to accelerate and foreclose when Regatta was similarly late the next month with its June 2000 payment without Reilly sending any late notice. (JA 556, 836.)

Although Regatta had made numerous late payments in the parties' course of performance over the prior sixteen (16) years, HUD instructed Reilly to accelerate the mortgage on July 19, 2000, supposedly because of a late June 1, 2000, payment and a late July 1, 2000, payment, stating, "Because of HUD's interest in this matter, we request that you expedite the filing of this insurance claim." (JA 556, 557.) HUD did not notify Regatta of its instruction to Reilly to accelerate and to file a mortgage insurance claim. Regatta first received a copy of HUD's July 19, 2000 letter to Reilly more than three years later when it was an exhibit to HUD's motion in the litigation.

Reilly sent Regatta a letter on July 26, 2000, purporting to accelerate the outstanding principal balance due on the mortgage without identifying any late payments or any other specific reason or basis for

acceleration. (JA 558.) Regatta made the late June 2000 payment in the month of July, which Reilly accepted. Regatta also made the July 2000 payment on July 28, 2000, which is within the thirty (30)-day grace period provided in the Note. (JA 543, 1094.) Reilly sent Regatta's July 2000 check back. HUD and Reilly treated the July 2000 payment as never having been made. (JA 1088, 1089.)

Without notifying Regatta that HUD was treating Regatta's returned July 2000 payment as a missed payment by Regatta, Reilly assigned the Note and Trust Deed to HUD, as HUD requested. (JA 482, 557.) In both its October 13, 2001 Notice of Default and Foreclosure Sale and the December 18, 2003 Declaration of Janet L. Browder, HUD's responsible San Francisco Hub asset manager, HUD identified the July 1, 2000 payment as initiating HUD's foreclosure on the property. (JA 607, 629.) Neither HUD nor Reilly notified Regatta in July 2000 that they regarded the timing of the July 2000 payment as the basis for acceleration or foreclosure.

HUD's next step on August 29, 2000, was to declare Regatta to be in default of the Regulatory Agreement, which is defined as an event of default under the third covenant of the Trust Deed. (JA 537, 979.) In that letter, HUD acknowledged that Regatta had maintained the property, contrary to HUD's accusation in the March 24, 2000, letter. After Reilly returned Regatta's July 2000 payment and HUD declared Regatta to be default of the Regulatory Agreement by August 29, 2000, Regatta did not tender any more monthly payments towards the principal balance Reilly asserted to be accelerated. On September 8, 2000, Regatta filed for Chapter 11 bankruptcy reorganization protection but was

ultimately unable to successfully reorganize.

Regatta's General Manager, Phil Rosequist, consulted with David Ewing, HUD's agent in the Las Vegas office that HUD had identified to Regatta as having "full authority to make decisions". (JA 949.) Mr. Ewing informed Mr. Rosequist that HUD intended to enforce its demand for more than one million dollars to the extent of foreclosing on the property regardless of the lack of merit to HUD's demand. (JA 855, 856, 949.)

Neither Reilly nor HUD ever accepted Regatta's right to cure by the July 28, 2000, payment or even Regatta's thirty (30)-day grace period under the Note to make the July 2000 payment. When HUD sent a letter to Regatta on May 22, 2001, announcing HUD's intent to foreclose, HUD first described to Regatta the late July 2000 payment, which Reilly had returned to Regatta, as being a "default" upon which "HUD declares the principal balance due and payable." (JA 597.) HUD consistently denied Regatta any right to cure the late monthly payments to avoid acceleration and foreclosure. (JA 1130.)

On June 12, 2001, Regatta responded to HUD's May 22, 2001, letter by denying HUD's entitlement to foreclosure under HUD's own legal and economic policies and by requesting HUD to reconsider its vindictive approach against Regatta. (JA 962,963.) HUD nonetheless held a foreclosure sale on December 8, 2001. (JA 962, 963.)

On August 21, 2003, Regatta filed its Complaint for wrongful foreclosure under the Federal Tort Claims Act in the United States District Court, District of Nevada. At that time, HUD's position was that the substance of the claim, rather than the terminology or characterization, controlled, and that the facts show that this case is within the jurisdiction of the Court of

Federal Claims. (JA 65, 66, 74.) HUD specifically argued that the Court of Federal Claims had exclusive jurisdiction over tortious breach of contract claims. The district court ordered the case transferred to the United States Court of Federal Claims on May 6, 2004. (JA 454.)

On January 5, 2006, the Court of Federal Claims granted summary judgment, dismissing Regatta's contract-based claims. The court did not address Regatta's cross-motion for continuance to permit depositions to be taken and discovery to be had under Rule 56(f). (1a.) In its crossmotion, Regatta identified witnesses it requested to depose and documents it wished to access to adequately respond to the United States' arguments about HUD's and Reilly's knowledge of the harm likely to result to Regatta from their denial of Regatta's contractual and statutory right to cure. (JA 715.) Regatta requested to have document production and depositions about details of HUD's and Reilly's handling of the demand for more than one million dollars, HUD's request to expedite filing of the insurance claim and the mortgage assignment transactions that they did not disclose in the Motion for Summary Judgment.

The Court of Federal Claims dismissed Regatta's third claim for breach of the covenant of good faith and fair dealing along with Regatta's second, fourth and fifth claims for tortious breach of contract, over which HUD argued the court lacked jurisdiction in contradiction to its argument made to the Nevada district court one year earlier. (6a, 10a; **compare** JA 65 with JA 1132.) E.g., *Morris v. United States*, 33 Fed.Cl. 733, 742 (1995). The Court of Federal Claims granted summary judgment on all other counts based upon the statement of facts the court provided.

With its opposition brief Regatta filed a twenty-one (21)-page, detailed, response to the requested findings under RCFC 56(h)(2). (6a; JA 682-702.) Regatta cited affidavits and numerous exhibits and stated numerous factual counterpoints, most of which are stated hereinabove, to the factual assertions by the United States. The Court of Federal Claims stated that no genuine material facts are disputed, but the court did not address Regatta's twenty-one page factual counterpoints. (6a.)

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEAL AND LOWER COURTS IN THOSE CIRCUITS ARE SPLIT ON THE JURISDICTIONAL QUESTIONS PRESENTED.

At HUD's urging, the Nevada District Court transferred the case to the Court of Federal Claims. HUD argued:

> **THE COURT OF FEDERAL CLAIMS HAS EXCLUSIVE JURISDICTION IN THE INSTANT ACTION.**
>
> * * * *
>
> The instant cause of action ostensibly involves an express contract, a regulatory agreement, and ostensibly a Deed of Trust, with the United States and Plaintiff, seeking recovery of more than $10,000. It must, therefore, be brought in the Court of Claims. DSI Corp. v. Secretary of Housing and Urban Development, 594 F.2d 177, 180 (9th Cir. 1979).

> . . . It is well settled that the Court of Claims, in deciding whether a case is "sounding in tort" will "look to the substance of plaintiff's claim rather than the terminology or characterization used."
>
> The Court of Federal Claims has consistently accepted jurisdiction over claims of "tortious breach" of contract. *Morris v. United States*, 33 Fed.Cl. 733, 742 (1995) Where a valid contract is alleged, "the fact that the alleged breach is also tortious does not foreclose Tucker Act jurisdiction." A claim "is not barred simply because it might also be stated as a tort." The Ninth Circuit Court of Appeals appears to have accepted this rationale. In *Northstar Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994), the Court held that a plaintiff's claim "concerned solely with rights created within the contractual relationship and [having] nothing to do with duties arising independently of the contract . . . is 'founded . . . upon [a] contract with the United States' and is therefore within the Tucker Act . . . [.]"

(JA 65, 66, bolding, capitalization and underscoring in original, citations omitted.) HUD correctly cited the Ninth Circuit law as interpreting the Tucker Act to vest the Court of Federal Claims with exclusive jurisdiction over contract claims against the United States exceeding $10,000.

In *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980), the Fifth Circuit Court of Appeals disagreed with the principle held by the Ninth Circuit in *DSI Corp.* The Fifth Circuit held that the

district court had jurisdiction over a contract claim against the Secretary of HUD and that the Court of Federal Claims did not have exclusive jurisdiction. The Fifth Circuit reasoned that the Secretary of HUD had a funding source separate from the national treasury, which separation of funding allowed suit in district court against the Secretary under the National Housing Act separate and apart from jurisdiction under the Tucker Act over a claim against the United States.

In *Carlyle Gardens Co. v. Delaware State Housing Authority*, 659 F. Supp. 1300 (D.Del. 1987), the court described the circuit courts as split on how to resolve the issue, citing additional cases from the Second and Seventh Circuits. Id. at 1305. The *Carlyle Gardens Co.* court determined exclusive jurisdiction over the contract claims against the United States to vest in the Court of Federal Claims pursuant to *Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471 (4th Cir. 1983).

Portsmouth Redevelopment and Housing Authority, and *Carlyle Gardens*, both reason that appropriations from the national treasury into separate funds do not change the character of the funds as being of the national treasury. These courts held that the Court of Federal Claims has exclusive jurisdiction over contract claims against the United States.

In the instant case, the Court of Federal Claims grouped Regatta's claim for breach of the covenant of good faith and fair dealing together with Regatta's other tortious breach of contract claims, which were the second, fourth and fifth counts, which the court dismissed for lack of subject matter jurisdiction, as HUD requested. (JA 7, 474, 476, 477.) As HUD argued below, the dismissal of the tortious breach claims for lack of jurisdiction goes against the court's opinion in

Morris v. United States, 33 Fed.C. 733, 742 (1995). Because the Court of Federal Claims did not discuss the reason for its jurisdictional decision, it remains unknown whether the court followed the Fifth Circuit's reasoning about the source of funding for the contract claim at issue. The court granted summary judgment on all other contractual-based claims which were not for torious breach. (JA 7, 475.)

The Federal circuit's affirmance of the Court of Federal Claims' dismissal for lack of subject matter jurisdiction conflicts with the principles held by the Ninth Circuit in *DSI Corp.*, *supra*, and arguably with the Fourth Circuit in *Portsmouth*, *supra*, as well. The split between the circuits may be broad or narrow, depending upon whether the funding source issue is deemed controlling. Neither the Ninth Circuit nor the Federal Circuit necessarily held the funding source to be controlling, but they nonetheless conflict in their views and results about the Court of Federal Claims' jurisdiction. To the extent the funding source is not an issue in this case, the Federal Circuit decision below conflicts with all of the circuit courts cited in this case, which all at least implicitly recognize that the Court of Federal Claims has at least concurrent jurisdiction, if not exclusive jurisdiction. The granting of Regatta's certiorari petition would allow the Court to resolve the conflict between the circuits.

II. ALL PARTIES WITH SIMILAR CLAIMS AGAINST ANY AGENCY OF THE UNITED STATES WOULD BENEFIT FROM A WRIT OF CERTIORARI IN THIS CASE.

The Court of Federal Claims has given its opinion in this case that it has no jurisdiction over a

claim for breach of the covenant of good faith and fair dealing. In affirming, the Federal Circuit has essentially given its opinion that the Court of Federal Claims need not hear any claims against the United States for breach of the covenant of good faith and fair dealing.

Both the Ninth Circuit and the Fourth Circuit opine that the Court of Federal Claims has exclusive jurisdiction over contract claims against the United States exceeding $10,000. If these two courts or any of the district courts within their circuits continue to recognize transfers to the Court of Federal Claims to be appropriate, parties with such claims will have to look to the Court of Federal Claims to exercise jurisdiction. Refusal by the Court of Federal Claims to hear such cases would leave these type of claimants against any federal government agency without a forum and without an opportunity to have their claims heard.

The Court of Federal Claims has recognized in the past its jurisdiction over such claims. In *Southern California Edison v. United States*, 58 Fed.Cl. 313 (2003), the court recognized an implied covenant of good faith and fair dealing in every contract. *Id.* at 325. The court also recognized the presumption of good faith unless bad faith is shown, which requires a plaintiff with such a claim to prove facts constituting malice or an intent to injure. *Id.* at 325. The court relied on its earlier case of *Asco-Falcon II Shipping Co. v. United States*, 32 Fed.Cl. 595 (1994).

In *Asco-Falcon II*, the court found that it had jurisdiction over claims for breach of the covenant of good faith and fair dealing. The court ruled that a claim for breach of the duty of good faith "requires 'well neigh irrefragable proof' to induce the court to abandon the

presumption of good faith dealing". *Id.* at 64, citing *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298, 1301-02 (Ct.Cl. 1976). The court equated this standard to clear and strong evidence of specific acts of bad faith by the government. *Id.* In *Asco-Falcon II*, while the proof standard is difficult, it is not impossible.

If the Court of Federal Claims could refuse to hear such cases because of the difficulty of proof, it would have no way of providing redress where the proof standard is met, regardless of the difficulty. Regatta's instant case is for such a claim.

The granting of certiorari would help plaintiffs with such claims in the future know where to file their actions. Granting certiorari would also let the Court of Federal Claims and the Federal Circuit know whether such claims belong in their respective courts.

III. GRANTING CERTIORARI WOULD MAKE POSSIBLE THE CORRECTION OF THE COURT OF FEDERAL CLAIMS' ERROR IN THIS CASE AND HELP PREVENT SIMILAR ERRORS FROM OCCURRING IN THE FUTURE.

The Court of Federal Claims has held in the past that it has jurisdiction over claims for breach of the covenant of good faith and fair dealing. E.g., *Southern California Edison*, *supra*, and *Asco-Falcon II*, *supra*. The United States cited both of these cases in its motion and recognized the court's jurisdiction at oral argument. (JA 666, 1132.) The United States also acknowledged to the Nevada district court that the Court of Federal Claims has jurisdiction over contract-based tortious breach claims generally.

Any opposition by the United States now to the

principle that the Court of Federal Claims has jurisdiction would be contradictory to the United States' prior position. It would also further show the mischief which can result from this type of error by the Court of Federal Claims. If the Court of Federal Claims does not take jurisdiction, Regatta will never have an opportunity to have its claim heard for breach of the covenant of good faith and fair dealing.

The implied covenant of good faith and fair dealing is a part of every contract. A breach of the covenant supports a claim for breach of contract. Such a breach also supports the intent element for tortious breach of contract claims. A breach of the covenant of good faith and fair dealing is also relevant to Regatta's other claims for declaratory judgment and breach of statutory duties under the Multi-Family Mortgage Foreclosure Act, 12 U.S.C. § 3704, 3705, for HUD's foreclosure without meeting the contractual prerequisites of a breach necessary to comply with the Act.

Finally, HUD has asserted the position that no inverse condemnation claim can lie, but HUD argued below that it had no privity with Regatta. (JA 659, 660.) In *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed.Cir. 1998), HUD's taking of the landowner's property rights without a contractual right to do so resulted in liability by HUD for just compensation under the Fifth Amendment. HUD's counsel's denial of privity renders Regatta's alternative takings claim viable.

It was error for the Court of Federal Claims to grant summary judgment against Regatta. The court was required to review the inferences to be drawn from the underlying facts in the light most favorable to Regatta. E.g., *Celotex Corp. v. Catrett*, 477 U.S. 317,

327, 91 L.Ed. 2d 265, 106 S.Ct. 2248, 2254 (1986). The court also erred by failing to allow Regatta an adequate time for discovery. *Celotex, supra*, and Fed.R.Civ.P. 56(f).

The court erred by denying Regatta the opportunity to conduct discovery concerning HUD's knowledge of the harm substantially certain to result from HUD's instruction to Reilly to treat the Note as accelerated. The Trust Deed provides a contractual right to cure, and NRS 107.080 prohibits acceleration of a trust deed in Nevada without providing prior notice and a right to cure. (JA 537.) NRS 107.080(2) and (3) provide in pertinent part as follows:

> 2. The power of sale must not be exercised, however, until:
>
> (a) In the case of any trust agreement coming into force:
>
> * * *
>
> (2) On or after July 1, 1957, the grantor . . . has for a period of 35 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance or payment;
>
> (b) The beneficiary, the successor in interest or the beneficiary or the Trustee first executes and causes to be recorded in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of the breach and of his election to sell or cause to be sold the property to satisfy the obligation [. . . .]

* * *

> 3. The . . . 35-day period provided in paragraph (a) of subsection 2 commences on the first day following the date upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by registered or certified mail, return receipt requested and with postage prepaid to the grantor, and to the person who holds the title of record on the date the notice of default and election to sell is recorded, at their respective addresses, if known, otherwise to the address of the trust property. The notice of default and election to sell must describe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the Deed of Trust, **but acceleration must not occur if the deficiency in performance of payment is made good and any costs, fees and expenses incident to the preparation or recordation of the notice and incident to the making good of the deficiency in performance or payment are paid within the time specified in subsection 2.**

(Emphasis added.) HUD's demand that Reilly accelerate in violation of the statute shows an intent by HUD to injure Regatta.

HUD's Hub Asset Manager, Ms. Browder, relied upon HUD's July 19, 2000, directive to Reilly for acceleration as being the basis to initiate the acceleration and foreclosure. (JA 629.) HUD did not

itself purport to accelerate but instead "required" Reilly to accelerate. (JA 556.) HUD's only disclosure between March 24, 2000, and May 3, 2001, to Regatta of a basis for acceleration and foreclosure was HUD's demand for more than one million dollars in thirty days. HUD waited more than a year during this time period to disclose that its demand for more than one million dollars was based upon payments which HUD's own Inspector General did not regard to be improper at the time of the audit in 1993 and which payments were more than six years old when HUD made its demand in 2000.

HUD has not denied a vindictive intent but has taken the approach that its intent is irrelevant. (JA 604, 856.) HUD used contradictory jurisdictional arguments below to "ping pong" the case out of district court and out of the Court of Federal Claims.

The court erred by dismissing Regatta's contract-based claims by summary judgment. The court should also have granted Regatta the opportunity to conduct discovery about HUD's and Reilly's knowledge of why HUD had threatened corrective action if Regatta did not pay one million dollars within thirty days; why HUD then directed Reilly to accelerate Regatta's Note; why Reilly rejected Regatta's cure payment; and why HUD foreclosed on the basis of the treatment of Regatta's July 28, 2000 payment Reilly returned as having never been made.

The Court of Federal Claims erred by dismissing for lack of jurisdiction Regatta's claim against HUD for breach of the covenant of good faith and fair dealing. Had the court considered the evidence of this claim, it also should not have granted summary judgment on the contract-based claims.

CONCLUSION

Regatta requests the Court to grant Regatta's Petition for Writ of Certiorari to make possible vacating the Court of Federal Claims' Judgment and remanding to the Court of Federal Claims to hear Regatta's claims and to allow discovery and trial on the merits.

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06-5061

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REGATTA BAY LIMITED,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

December 8, 2006, Decided
December 8, 2006, Filed

NOTICE: DECISION WITHOUT PUBLISHED OPINION

JUDGES: RADER, and DYK, Circuit Judges, WHYTE, District Judge *.

* Honorable Ronald M. Whyte, District Judge, United States District Court for the Northern District of California, sitting by designation.

OPINION: JUDGMENT

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

Per Curiam

AFFIRMED. See Fed. Cir. R. 36.

Filed: January 5, 2006

No. 04-1403C

In the United States Court of Federal Claims

REGATTA BAY LIMITED,
Plaintiff-,

v.

UNITED STATES,
Defendant.

Paul C. Ray, John Peter Lee, LTD., Las Vegas, Nevada, for plaintiff.

David B. Stinson, United States Department of Justice, Commercial Litigation Branch, Civil Division, Washington D.C., for defendant.

OPINION

HODGES, Judge.

HUD encourages private industry to provide low-income housing by insuring mortgages for the construction and renovation of existing housing projects that satisfy the requirements of the National Housing Act, 12 U.S.C. §§ 1701-1715. Regatta Bay owned a 120-unit housing project in Nevada, constructed with the proceeds of a loan insured by Department of Housing and Urban Development pursuant to the Act. 12 U.S.C. § 1709. The United

States eventually foreclosed on the housing project for default of its note and mortgage. Plaintiff filed suit in a Nevada district court as a result of the foreclosure, and the case was transferred here.

Regatta Bay seeks $2,000,000 in damages for breach of contract and a declaratory judgment that plaintiff did not breach a Regulatory Agreement connected with the transaction. Plaintiff evidently believes that if HUD foreclosed on Regatta Bay's property pursuant to the Regulatory Agreement, such foreclosure was improper. The Regulatory Agreement governed the conditions upon which plaintiff operated the housing project, however. HUD foreclosed on the project pursuant to the terms of its note and mortgage. See 12 U.S.C. §§ 3705-3708.

Plaintiff's Complaint includes allegations of wrongful foreclosure, tortious interference with contractual relations, tortious breach of fiduciary duty, and breach of covenants of good faith and fair dealing. The Government moved to dismiss Regatta Bay's causes of action for lack of jurisdiction and for summary judgment. Defendant acted properly within the rights assigned to the Government in the deed of trust and note.

BACKGROUND

HUD insures mortgages for the construction or rehabilitation of existing multifamily housing projects that meet the eligibility requirements of the National Housing Act. 12 U.S.C. §§ 1701-1715. Owners agree to operate the housing projects in compliance with terms

and conditions of Regulatory Agreements, and HUD protects lenders from default.

Plaintiff's September 1979 Regulatory Agreement with HUD was typical in that it contained conditions governing operation of the housing project. See 12 U.S.C. § 1709; 24 C.F.R. § 200.105. For example, it placed restrictions on plaintiff's management of funds and required Regatta Bay to maintain the property in accordance with government standards for public housing. Regatta Bay acquired the property involved in this lawsuit in November 1983. The property was subject not only to the Regulatory Agreement but also to a $3,685,100 note and mortgage.

Regatta Bay often was late on its payments to the holder of the HUD-insured note and mortgage, Reilly Mortgage Group, Inc. When Regatta Bay did not make its June 2000 payment on time, HUD instructed Reilly Mortgage to accelerate plaintiff's debt. Reilly accelerated plaintiff's note on July 19, 2000. Plaintiff alleged in its Complaint that neither Reilly Mortgage nor HUD had objected to Regatta Bay's many late payments before this.

Regatta Bay sent the June payment to Reilly on July 28, along with another check in the same amount. Plaintiff has stipulated that it submitted the July 28 payment for the installment due on June 1, 2000. Reilly returned the extra payment, and plaintiff did not make payments to Reilly Mortgage Group thereafter.

HUD had sent Regatta Bay notices of violations of its Regulatory Agreement in March and April of 2000 because it asserted that plaintiff was mismanaging

funds and not maintaining the property as required.[1] HUD informed Regatta Bay in August 2000 that it remained in default of the Regulatory Agreement for failure to take corrective action regarding the mismanagement of funds and the physical upkeep of the property that HUD had warned Regatta Bay about in March and April of 2000.

Regatta Bay filed for Chapter 11 bankruptcy protection in September 2000. Reilly assigned its note and mortgage to HUD once the Government paid its loan guaranty, and HUD recorded the assignment on October 6, 2000. HUD acquired Reilly's position as first lienholder of the property, along with the rights to any rents generated. HUD filed a proof of claim for $3,062,808 in the bankruptcy court on February 21, 2001. Regatta Bay stipulated on April 4, 2001 that the United States had a valid, secured claim against all of the plaintiff's property, that the property had a market value of $2,360,000, and that Regatta Bay had no equity in its property.

The bankruptcy court issued an order on April 25, 2001 granting the Government's motion for relief from the automatic stay. HUD sent Regatta Bay a notice of intent to foreclose in May 2001 and served plaintiff with a notice of default and foreclosure sale in October 2001.

HUD and Regatta Bay agreed in November 2001 that HUD would cancel its foreclosure sale if plaintiff made its $3,062,808 payment no later than December 3, 2001. Plaintiff did not take this opportunity to cure, and the foreclosure sale proceeded the next day. HUD received $3,600,000 for the property and paid the surplus to Regatta Bay.

DISCUSSION

This court has jurisdiction to hear "any claim against the United States founded either upon the Constitution . . . or any regulation . . . or upon any express or implied contract with the United States . . . not sounding in tort." 28 U.S.C. § 1491(a)(1). Plaintiff's claims in this case include wrongful foreclosure, tortious interference with contractual relations, tortious breach of fiduciary duty, and breach of covenants of good faith and fair dealing. The parties agree that no genuine, material facts are disputed. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52 (1986); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); RCFC 56(c).

Plaintiff seeks damages arising from an alleged unlawful acceleration of the loan and the subsequent foreclosure on Regatta Bay Apartments by HUD. Regatta Bay argues that HUD foreclosed because of plaintiff's default of the Regulatory Agreement. Comp. ¶ 22. Defendant asserts that the foreclosure was based upon Regatta Bay's default on the note.

A. Acceleration and Foreclosure

The terms of plaintiff's note and mortgage controlled its debt. HUD's authority to instruct Reilly to accelerate plaintiff's debt due to default, and to foreclose on the property, arose from the note and mortgage, not the Regulatory Agreement. The note states:

If default be made in the payment of any installment under this Note, and if such default is not made good prior to the due date of the next such installment, the

entire principal sum and accrued interest shall at once become due and payable without notice; at the option of the holder of this Note.

HUD directed Reilly to accelerate the note because plaintiff did not make its June 2000 payment on time. Regatta Bay argues that its June 2000 payment should not have been treated differently from the other late payments. Its Complaint states,

whenever Regatta was late with any payment Regatta paid a contractually pre-determined late fee which the loan servicing agent, Reilly Mortgage Group, Inc. and HUD accepted as not being a material breach [and] HUD never objected to the lateness of any of Regatta's payments despite being made after the deadline of the first of the month on numerous occasions throughout the time of [plaintiff's] ownership.

Compl. ¶ 5. The note provides that the Government cannot waive its right to accelerate, however: "Failure to exercise this option [acceleration] shall not constitute a waiver of the right to exercise the same in the event of any subsequent default." Moreover, the June 2000 payment was different from Regatta's previous late payments.

Regatta Bay admitted that "[a]ll the payments that were made that were late that were accepted by Reilly were within the grace period." The note could be accelerated at any time that an installment was not made prior to the due date of the next installment. Regatta Bay's June 2000 payment was due on June 1; the July payment was due on July 1. Plaintiff made its

June payment on July 28. This was outside the grace period.

B. Regulatory Agreement

Plaintiff seems to assert that HUD and Reilly derived their rights to accelerate and foreclose the loan from the Regulatory Agreement. The Regulatory Agreement governed the management operations of the housing project. See 12 U.S.C. § 1709; 24 C.F.R. § 200.105. Plaintiff's improper use of funds and failure to maintain the property were violations of the Regulatory Agreement. HUD's letter to Regatta on August 29, 2000 included the following:

[T]he Secretary has . . . declared [Regatta Bay] to be in default of [the] Regulatory Agreement. Such default is based on violations of paragraphs 8(b) and (e) of the Regulatory Agreement. As an immediate effect of the default, the Department intends to take other enforcement actions which may include, but not limited to, the imposition of other administrative and/or civil sanctions as determined appropriate by the Department.

HUD made no mention of acceleration or foreclosure in this letter. The Government warned only that Regatta Bay could be fined, or that other sanctions could apply. HUD addressed acceleration and foreclosure in its May 29, 2001 letter:

HUD has determined that the mortgage on Regatta Bay Apartments is in default because payments for the months of July 1, 2000 through May 1, 2001 have not been made. Sufficient payments are not being made to

cure the financial default. HUD's policy is that it will initiate foreclosure proceedings on mortgages in default

. . . .

The note and mortgage had no application to the civil penalties invoked by violation of the Regulatory Agreement. Default of the Regulatory Agreement led to potential fines, whereas default under the note led to acceleration and foreclosure. No connection of record exists between default of the Regulatory Agreement and foreclosure on the property, other than their proximity in time.

C. Opportunity to Cure

Reilly assigned its rights to the Government once it had accelerated the note and been paid on its guaranty. Regatta Bay could have cured its default prior to foreclosure pursuant to the Multi-Family Mortgage Foreclosure Act. 12 U.S.C. §§ 3705-3709. Foreclosure may be cancelled if the debtor tenders "the entire amount of principal and interest which would be due if payments under the mortgage had not been accelerated," before the public auction is completed. 12 U.S.C. § 3709(a)(3). HUD offered to cancel the foreclosure provided the $3,062,808 were paid by December 3, 2001. HUD proceeded with foreclosure when plaintiff rejected this offer. HUD's notice of intent to foreclose dated May 22, 2001 asked plaintiff to show "reasons why foreclosure should not take place." Regatta Bay did not provide such reasons, but stated in a June 12, 2001 letter that:

HUD should not foreclose on the subject property because of a number of miscommunications which have

occurred in the instant case involving the inherently difficult task of communication and coordination of multiple offices located in San Francisco, Los Angeles, and Washington, D.C.

These were not sufficient legal reasons why HUD should not have proceeded with foreclosure; plaintiff did not dispute its financial default.

D. Declaratory Relief

Regatta seeks a declaratory judgment that the Government was incorrect in its finding that plaintiff was in default of the Regulatory Agreement. Compl. ¶¶ 54-58. Regatta Bay argues that "HUD's denial of Regatta's rights to insurance under the Regulatory Agreement and . . .HUD's pursuit of the wrongful declaration of default and foreclosure of the property constitutes a taking in violation of the Fifth Amendment of the United States Constitution." Compl. ¶ 65. Plaintiff's rights arose from its contracts with the Government; however, so only contractual remedies apply. Sunrise Village Mobile Home Park, L.C. v. United States, 42 Fed. Cl. 392, 404 (1988). Reilly Mortgage accelerated the loan and assigned it to HUD. HUD did not take plaintiff's property for public use, but to satisfy Regatta Bay's note and mortgage.

CONCLUSION

The Government's foreclosure on the subject property was appropriate given the terms of HUD's note and mortgage. Defendant's motion to dismiss counts 2, 3, 4, and 5 is GRANTED; its motion for summary judgment on all other counts is GRANTED. The Clerk of the

Court will enter judgment for the Government and dismiss plaintiff's Complaint. No costs.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

06-5061

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REGATTA BAY LIMITED,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

February 14, 2007, Decided

February 14, 2007, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

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ANDRE, OF COUNSEL ATTORNEY, Department of Housing and Urban Development, Los Angeles, CA.

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 21, 2007.

Filed 1/6/2006

No. 04-1403C

In the United States Court of Federal Claims

REGATTA BAY LIMITED,
Plaintiff-,

v.

UNITED STATES,
Defendant.

JUDGMENT

Pursuant to the court's Opinion, filed January 5, 2006, granting defendant's motion to dismiss counts 2,3,4, and 5, and granting defendant's motion for summary judgment on all other counts.

IT IS ORDERED AND ADJUDGED this date, purusant to Rule 58, that judgment is in favor of defendant and the complaint is dismissed. No costs.

28 U.S.C. § 1491(a):

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been

issued under section 6 of that Act.